In the Supreme Court of the United States

October Term A. D. 1940

NO. 539

STATE OF MINNESOTA, Petitioner,

vs.

DULUTH, MISSABE AND NORTHERN RAILWAY COMPANY, and Duluth, Missabe and Iron Range Railway Company, Respondents.

NO. 540

STATE OF MINNESOTA, Petitioner,

vs.

THE DULUTH AND IRON RANGE RAIL ROAD COMPANY and Duluth, Missabe and Iron Range Railway Company, Respondents.

NO. 541

STATE OF MINNESOTA, Petitioner,

vs.

SPIRIT LAKE TRANSFER RAILWAY COMPANY and Duluth, Missabe and Iron Range Railway Company, Respondents.

NO. 542

STATE OF MINNESOTA, Petitioner,

vs.

OLIVER IRON MINING COMPANY, Respondent.

NO. 543

STATE OF MINNESOTA, Petitioner,

vs.

PROCTOR WATER & LIGHT COMPANY, Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

For the convenience of the court we shall reply to the points in respondents' opposing brief in the order in which they are there treated.

POINT I.

Relating to the payment of the sum of $7,774,804.19 by the United States to defendant Duluth, Missabe and Northern Railway Company in 1933, pursuant to the Act of Congress of June 16, 1933.

The Minnesota Supreme Court in its decisions herein has divided all income received by railroad corporations into two categories:

1. Railroad income which **is not** to be included in the measure of its tax under the Minnesota Corporate Franchise Tax statute.
2. Non-railroad income which **is** to be included in the measure of this tax.

The State Court has placed the sum of $7,774,804.19 received by defendant Duluth, Missabe and Northern Railway Company from the United States under the provisions of the Act of Congress of June 16, 1933 in the category of railroad income. Hence, the State Court has held that this sum was not to be included in the measure of said defendant's tax under the Minnesota Corporate Franchise Tax Statute.

In the State's Petition for Writ of Certiorari and Brief in Support thereof (pp. 12-25, 46-60), it was pointed out that in placing this sum in the category of railroad income, the State Court had misconstrued the Act of Congress of Feb. 28, 1920, considered by this Court in the case of Dayton-Goose Creek Railroad Company vs. United States 263 U. S. 456, 44 S. Ct. 169, 68 L. ed. 388, which originally established the "Railroad Contingent

Fund" and the Act of Congress of June 16, 1933 under the provisions of which this sum was received by said defendant.

It was further pointed out that under the provisions of the Act of Congress of June 16, 1933, it was not necessary for the recipient of any payments thereunder to either own or operate a railroad, or to engage in any distinctive railroad activity whatsoever. In fact, it was not necessary for the recipient to even to be a railroad corporation as distinguished from any other kind of corporation, or even to possess the power to engage in the railroad business at the time of the enactment of this Act of Congress of June 16, 1933 or at any time thereafter.

Therefore, under the proper construction of these Acts of Congress, this sum of $7,774,804.19 received by defendant Duluth, Missabe and Northern Railway Company from the United States should have been placed in the category of non-railroad income.

However, respondents do not merely claim this sum to be railroad income, but they also go further and contend that the decisions of the State Court on this point did not involve or depend upon a construction of any Acts of Congress.

Respondents in their opposing brief have treated the receipt by defendant Duluth, Missabe and Northern Railway Company from the United States in 1933 of the sum of $7,774,804.19 as if that part of the opinion of the State Court dated April 26, 1940 relating to this subject stood alone and had no connection whatsoever with its opinion of December 29, 1939. However, in its earlier opinion the State Court considered and gave its views in reference to the taxability under the Minnesota statute of the sum of $5,808,256.61 constituting the major

part of this sum thus received from the United States. The Court said (R. p. 1637; 207 Minn. 618, 625, 292 N. W. 401, 405):

> "The state lists in its brief a number of items which it claims to be "non-operating income," intending thereby to challenge the income therefrom as not properly earnings which result from railroad ownership or operation. Included in this list are the so-called "recapture" fund **returned by the United States government to the railroads by act of Congress, 48 Stat. 220.** The United States under the transportation act of 1920, 41 Stat. 448, took one-half the net earnings of railroads over and above six per cent and held such sums for railroad transportation purposes. Defendants at the time paid taxes on their property measured by all their gross earnings including these funds and paid these funds to the government partly in cash and partly in Liberty bonds. Can the return of these deposits by the government together with interest and accretions be deemed non-railroad income for 1933 and as such taxable under c. 405? It seems clear that the original deposits were railroad income subject to the gross earning tax and upon which such tax was paid. Therefore such returned funds cannot be considered non-railroad income under c. 405, §2. **The repayment amounts to nothing more than the return to defendant of their own railroad earnings. The restoration reinstated the earnings in their original status.** The fund, then, having been taken in the first instance for railroad purposes, held by the government for such purposes, and returned to the companies for railroad purposes are not taxable under c. 405. We need not decide

whether the accretions and interest are taxable items because the combined net loss reported is sufficient to absorb both items as well (fol. 1650) as some others subsequently discussed. The act of Congress providing for the repayment of these recaptured funds, 48 Stat. 220, expressly required that such repayments should be subject to federal income taxes. The board of tax appeals cases cited by the state are therefore not authority here." (Emphasis supplied.)

In this later opinion, the State Court stated that it still adhered to the views it had expressed in its earlier opinion. The court said (R. p. 1816; 207 Minn. 637, 638, 292 N. W. 411, 412, 413):

"Due to the fact that in our original opinion State v. D. M. & N. Ry. Co., — Minn. —, — N. W. — We did not adopt in toto either the theory of the state or that the defendants nor yet that of the trial court, we were reluctant to pass upon certain features which would have been more fully pre sented to us had counsel been aware of **our views on the principal questions involved and to which we now adhere.** (Emphasis supplied.)

We may therefore conclude that the Minnesota Supreme Court has held and still adheres to its opinion that the major portion of the sum of money received by defendant Duluth, Missabe and Northern Railway from the United States was not **non-railroad income for the year 1933.** because it was a restoration reinstating the **earnings** of the recipient to their original status as railroad income for the years in which they were originally earned and upon which the gross earnings tax had been paid in prior years.

We may also conclude that in the opinion of the State Court the so-called "accretions" amounting to $1,966.546.58, which is a part of said sum of $7,774,804.19 received by defendant Duluth, Missabe Northern Railroad Company from the United States, are considered as merely being accretions to earnings of said defendant restored to their original status as railroad income for the years in which they were originally earned.

It is to be noted that nowhere in its opinion of Dec. 29, 1939 did the State Court say that this receipt from the United States constituted **railroad income for the year 1933.** All that the State Court decided is that it was not non-railroad income for 1933, because it was railroad income for prior years reinstated to their original status.

As far as the year 1933 is concerned, the State Court has in effect held that this payment by the United States was merely a receipt of money in 1933; that it **did not constitute either railroad or non-railroad income for 1933;** that this receipt was but a returning and restoration of railroad income for years previous to 1933.

This is a clear misconstruction of the Act of Congress of June 16, 1933, under the provisions of which the sum of $7,774,804.19 was received from the United States by said defendant. This Act in the most unmistakable language specifically states that all monies received under this act **shall constitute income for the year in which it was received from the United States and shall not constitute income for the years in which the payments were originally made to the United States.** This is found in the following provision of the Act. (Act of Congress of June 16, 1933, "Emergency Railroad Transportation Act, 1933", 48 Stat. 220, Ch. 91, Title II, Sec. 206, Title 49 U. S. C. A. Section 15b):

"(b) The income, war profits, and excess-profits tax liabilities for any taxable period ending after Feb. 28, 1920, of the carriers or corporations whose income, war profits, or excess-profits tax liabilities were affected by section 15a of the Interstate Commerce Act, as in force prior to the enactment of this act, shall be computed as if such section had never been enacted, except that, in the case of carriers or corporations which have made payments under paragraph (6) of such section, an amount equal to such payments shall be **excluded from gross income for the taxable periods with respect to which they are made.** All distributions made to carriers in accordance with subdivision (a) of this section shall be **included in the gross income of the carriers for the taxable period in which this Act was enacted."** (Emphasis supplied.)

Thus the decisions of the State Court to the effect that the sum of $7,774,804.19 received by defendant Duluth, Missabe and Northern Railway Company from the United States in 1933 could not be included in the measure of its corporate franchise tax, because this receipt was not non-railroad income for 1933, but was railroad income for previous years and "accretions" thereto, are erroneous. They are based upon a palpable misconstruction of an Act of Congress. Hence these decisions should not stand.

Respondents, in their opposing brief contend that the State of Minnesota was given no right to tax the sum of $7,774,804.19 received by defendant Duluth, Missabe and Northern Railway Company from the United States, under the Acts of Congress by virtue of which this sum was received by said defendant.

Thus respondents, in effect, urge that before any "title, right, privilege or immunity" can be claimed "under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the "United States", it is necessary that such title, right or privilege or authority be specifically set forth in so many words in the Constitution, treaty or statute of the United States.

Respondents have presented no authorities in support of this novel contention. Nor do we know of any case where so narrow a construction has been placed by this Court upon the titles, rights, privileges or immunities which may be claimed under the Constitution, treaties or statutes of the United States.

We know of no case where this Court has not upheld all titles, rights, privileges or immunities which follow from a correct construction of the Constitution, treaties or statutes of the United States; even though they may not have been specifically set forth or enumerated therein.

It is the contention of the petitioner in the instant cases, that under a correct construction of the Acts of Congress, the sum of $7,774,804.19 received by defendant, Duluth, Missabe and Northern Railway Company from the United States in 1933, is subject to inclusion in the measure of said defendant's tax under the Minnesota corporate franchise tax statute.

Therefore, we respectfully submit that by reason of the misconstruction of said Acts of Congress, the State of Minnesota, petitioner herein, has been deprived of its rights arising from said Acts of Congress.

The defendant Duluth, Missabe and Northern Railway Company, by its own volition and accord, has itself raised the question as to the right of the State of Minne-

sota to include this sum received from the United States in the measure of its tax by reason of its having been received under the provisions of an Act of Congress. This is set forth in paragraph 10 of said defendant's Answer to plaintiff's Amended Statement (R. p. 43) and its Answer (Substituted) (R. p. 293) which states the following:

> 10. "Alleges that the item "Refund of Recapture Payments" amount to $5,808,256.61 and the item "Accretions to Recapture Fund" amounting to $1,817,163.53 together with an additional item of $149,384.06 being accretions to the Recapture Fund in 1933 erroneously reported by the defendant as taxable income, under the caption "Gross Income" in said Exhibit "A" represent moneys received by the taxpayer from the United States Government under the provisions of the Act of Congress of June 16, 1933, being chapter 91, Title II, Section 206, 48 Stat. 220; that such moneys to not constitute income of this defendant taxable under the Minnesota State Income Tax Act among other reasons because they constitute a gift from the United States Government, an instrumentality of the United States Government and/or **income earned by the taxpayer in previous years".** (Emphasis supplied.)

Thus said defendant specifically requested that under the provisions of the Act of Congress, the sum of $7,774,804.19 that it had received from the United States in 1933 be construed as a gift from the United States "and/or **income earned by the taxpayer in previous years".**

In response to this specific request, the State Court did give to the provision of the Act of Congress under which this sum was received by defendant one of the alternative constructions that it had requested, viz:—that this receipt of money from the United States was **"Income earned by the taxpayer in previous years."**

This issue was fully litigated in the lower state court. Under the provisions of the Minnesota Statute pertaining to actions for the collection of the corporate franchise tax, no reply was necessary in order to litigate all the issues raised in defendant's answer. [1]

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[1] Chapter 405 of the Laws of Minnesota, 1933 contains the following provisions in section 45 thereof.

> "45. Action for collection of tax. (a) A tax imposed by this Act, including penalties therein, or any portion of such tax, is not paid within 30 days after it is required to be paid hereunder, the Commission shall, unless it proceeds under the provisions of subdivision (b) hereof, bring against the person liable for payment thereof an action at law in the name of the state for the recovery of the tax and interest and penalties due in respect thereof under this act. * * * Such action shall be commenced by filing with the clerk of such Court a statement showing the name and address of the taxpayer, if known, an itemized summary of the taxable net income on the basis of which the tax has been computed, the tax due and unpaid thereon and the interest and penalties due with respect thereto under the provisions of this Act, and shall contain a prayer that the Court adjudge the taxpayer to be indebted on account of such taxes interest and penalties in the amount thereof specified in the statement; a copy of such statement shall be furnished to the clerk therewith. * * * If an answer is filed, the issues raised shall stand for trial as soon as possible after the filing of such answer and the court shall determine the issues and direct judgment accordingly, * * *".

Thus we have a clear cut federal question at issue between the State of Minnesota and said defendant. The State, on one hand, contended that it had the right to include this receipt from the United States by defendant, under a proper construction of the Act of Congress by virtue of which it was received by defendant. On the other hand, defendant contended that under a correct construction of this Act of Congress, this sum could not be included in the measure of its tax.

The State Court decided this issue in favor of defendant by construing the Act of Congress so as to determine the sum thus received from the United States to be **"income earned by defendant in previous years."**

This issue was not merely raised in the State Courts, both District and Supreme, but even in the proceedings before the Minnesota Tax Commission prior to the commencement of the State's actions, which were admitted in evidence in the trial of the case in the lower state Court. (See R. pp. 118, 127, 128, 331, 222, 223, 233, 234.)

Therefore, we submit that the right of the State of Minnesota to tax this sum of $7,774,804.19 received by defendant from the United States following a proper construction of the Act of Congress under the provisions of which it was received, were not merely **either** raised by the State **or** considered by the State Court in its opinion (which is all that is necessary to give this court jurisdiction) [2], but was **both** claimed by the state at all stages of this litigation **and** considered by the State Court in its opinion.

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[2] See San Jose Land, etc. Co. v. San Jose Ranch Co., (Cal. 1903) 189 U. S. 177, 23 S. Ct. 487, 47 L. ed. 765; Mallinckrodt Chemical Works v. Missouri, (Mo. 1915) 238 U. S. 41, 35 S. Ct. 671, 59 L. ed. 1192; Cissona v. Tennessee, (Tenn. 1918) 246 U. S. 289, 38

(Footnote continued on following page.)

POINT II.

Relating to the Taxation of Affiliated Corporations upon a consolidated basis.

Respondents in an effort to show that the non-constitutional grounds advanced in the opinion of the State Court are independent and adequate non-federal grounds for its decision in the Oliver case have endeavored to attach some significance to the larger amount of space devoted to them in the State Court's opinion than to the constitutional grounds (R. pp. 1641-6, State of Minnesota v. Oliver Iron Mining Co., 207 Minn. 630, 292 N. W. 411). An analysis of the opinion of the State Court from this standpoint is therefore in order.

The greater portion of the State Court's opinion in this case, after several introductory paragraphs, is taken up with an attempt to trace the legislative history of this section of the Minnesota statute to a Wisconsin statute (R. pp. 1642-4, 207 Minn. 630, 632-4, 292 N. W. 407, 408-10). Any attempt to trace the legislative history of a statutory provision must of necessity require much space in an opinion. This could not have been avoided once the State Court had undertaken this chore. Surely, this circumstance cannot in any way add to the stature of this portion of the State Court's opinion from the standpoint of independence and adequacy as a non-federal ground.

The conclusion arrived at by the State Court as the result of this, was that the Minnesota legislature gave to the Minnesota Tax Commission the power the Wis-

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S. Ct. 306, 62 L. ed. 720; International Harvester Co. v. Missouri, (Mo. 1914) 234 U. S. 199, 34 S. Ct. 859, 58 L. ed 1276; Lawrence v. State Tax Commission of Mississippi, 286 U. S. 276, 52 S. Ct. 556, 76 L. ed. 1102.

(Footnote continued from preceding page.)

consin commission claimed, intimating thereby that the Wisconsin Commission was contending for a restriction of its power so that it would be compelled to compute the tax of affiliated corporations upon a combined basis; when, as a matter of fact, what the Wisconsin Commission actually claimed was the **discretionary** power to tax affiliated corporations upon a combined basis. Who ever **heard of a governmental commission, in this day and age, ever contending for a restriction rather than for an expansion of its powers?** Therefore, this cannot be considered as adequate and independent non-federal ground.

A large part of the last paragraph dealing with the legislative history of this provision of the Minnesota Act is taken up with an effort to establish the intent of the legislature to give the word "may" in the second sentence of section 32c of the Act, a mandatory rather than its natural permissive interpretation, on the alleged ground this normally would be more profitable to the state (R. pp. 1644, 1645, 207 Minn. 630, 634, 635, 292 N. W. 407, 410).

The utter fallacy of this contention has been definitely established in the State's Petition and Brief (pp. 82-85), on the basis of statistics furnished by the Treasury Department of the United States government. Therefore, this also cannot be considered as an adequate and independent non-federal ground.

The next paragraph is fairly lengthy (R. p. 1645, 207 Minn. 630, 635, 292 N. W. 407, 410). It is devoted to a consideration of the question of penalty. This paragraph forms the basis for the State Court's conclusion that the granting of discretionary power to the Tax Commission in the matter of computing the tax of affiliated corporations upon a combined basis, would be unconstitutional. Therefore, it too cannot be said to provide an

independent and adequate non-federal ground for the opinion of the Court.

Then follows a fairly short paragraph (R. pp. 1645, 1646, 207 Minn. 630, 635, 636, 292 N. E. 407, 410). This returns to a consideration of the intent of the legislature from the revenue standpoint. Having already previously stated that the mandatory taxation of affiliated corporations upon a combined basis would normally be more profitable to the state, the court continues along this vein with the thought that affiliated groups of corporations would seek to avoid all suspicion of tax evasion so as to retain the advantage of being taxed upon an individual basis rather than upon a combined basis. Hence, neither can this paragraph be considered as an independent and adequate non-federal ground for the opinion of the State Court.

The next paragraph refers to the rule of statutory construction when the power conferred is to be exercised for the benefit of the state or a private party. Standing alone, this paragraph would be meaningless because it does not state for whose benefit the power was conferred in the instant case. It only has application in connection with the erroneous theory advanced by the State Court that the mandatory taxation of affiliated corporations upon a combined basis would normally be most profitable to the state. Hence this paragraph likewise offers no independent and adequate ground for the decision of the State Court.

Thus no particular significance can rightfully be attached to the amount of space devoted by the State Court in its opinion to these alleged non-federal grounds for its decision.

The involved reasoning of the State Court in its opinion in the Oliver case can only be explained when there

is taken into consideration the fact that it was seeking to find an **alternative** to a construction of a provision of a statute which would render it unconstitutional. This has been demonstrated in the State's Petition and Brief pp. 79-81, in which were cited the cases of State ex rel Decker v. Montague, 195 Minn. 278, 262 N. W. 684 and Johnson Service Co. v. Kruse, 121 Minn. 28, 140 N. W. 118, also Dunnell's Minnesota Digest, Sections 8931 and 8950.

The State Court undertook the task of finding a "reasonable **alternative**" to a construction of a statutory provision which would render it unconstitutional, even though the construction resulting in unconstitutionality was the **"more natural"**. Thus all the discussion in the State Court's opinion prior to its consideration of the constitutional questions involved is but **preliminary** thereto.

It is of the utmost significance that the **only** place in the entire opinion where the State Court specifically stated in so many words that it is actually interpreting the statute, is in the last sentence of the paragraph discussing the constitutional questions, where the court says (R. pp. 1646, 207 Minn. 630, 636, 292 N. W. 407, 411).

> **"We therefore give the statute an interpretation in harmony with the constitution."** (Emphasis supplied.)

Hence everything that the State Court said in its opinion before is but the **prelude** to the **climax** reached in this sentence where the court performs the **decisive act of interpretation.**

Thus the Minnesota Supreme Court has inextricably interwoven all the federal and non-federal grounds into the fabric of its decision in this case.

As has already been demonstrated in the State's Petition and Brief, the rationale for all the constitutional objections to the natural permissive interpretation of the word "may" in the second sentence of section 32c of the Minnesota Act break down completely when it is once recognized that the granting of discretionary power to tax affiliated corporations upon a combined basis in a proper case does not amount to the granting of the power to impose a discretionary penalty upon the affiliated group.

It has been recognized by a number of states having similar provisions in their statutes, including New York and California, that the granting of such discretionary power to a tax commission makes it easier to cope with the complex tax problems arising from the intercompany transactions of affiliated corporations. Congress has also seen fit to grant the Commissioner of Internal Revenue discretionary powers in this field.

In no case has any other court, either Federal or State, ever construed the exercise of such discretionary power by a taxing authority as the imposition of a penalty upon the affiliated group of corporations thus taxed upon a combined basis.

We submit that when once made aware that the natural permissive interpretation of the word "may" in the contested provision of the Minnesota Act would not make it violative of the Fourteenth Amendment, the State Court would recognize that the rationale by which it had arrived at its decision had broken down. The State Court would then feel free to give the word "may" in this provision of the Minnesota Act its natural permissive interpretation, and not find it necessary to wander far afield in order to justify an unnatural mandatory interpretation thereof.

POINT III.

Relating to the inclusion of income from Federal Securities in the measure of the Minnesota Corporate Franchise Tax.

A. THE QUESTION IS NOT MOOT.

The Question as to the inclusion of income from federal securities in the measure of the Minnesota corporate franchise tax would most certainly **not** be moot, should this Court determine **any one** of the other questions involved in the within cases in favor of the State of Minnesota. A decision upholding the State's contention in reference to income from federal securities would then serve to increase the amount of taxes for the year 1933 which would be due to the State of Minnesota from respondents who would be affected thereby. Hence this question is **not** moot.

The claim that this question is moot can therefore only be raised in the event that this Court should decide against the State on **all** the other questions involved in the within cases. Only then would the State Court's computation of a net deficit for the affiliated group of corporation in excess of $900,000 be permitted to stand. This sum, of course, is greater than the sum of $364,110.24 received by respondents as income from federal securities.

However, this question is one of great public concern to the State of Minnesota. All corporations taxable under the provisions of the Minnesota Act which derive any income at all from federal securities are affected thereby; not merely the respondents. Even the respondents may be affected in their taxation for years subsequent to 1933.

In holding that the inclusion of income from federal securities in the measure of the Minnesota corporate franchise tax is violative of the United States Constitution, the State Court has set a precedent which is seriously hampering the collection of corporate franchise taxes by the State of Minnesota. This makes it of the upmost importance to the State that a determination of this question be had as soon as possible.

If this Court should not consider this question now, it would mean that several years more may have to elapse before this question could finally be determined. In the meantime, the collection of corporate franchise taxes by the State of Minnesota would be seriously interfered with.

There is ample precedent for this Court to take cognizance of this predicament of the State of Minnesota and to consider this question. This court held in Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 31 S. Ct. 279, 55 L. Ed. 310 as stated in the syllabus. [8]

> "The case is **not** moot where **interests of a public character as asserted by the Government under conditions that may be immediately repeated,** merely because the particular order involved has expired." (Emphasis supplied.)

Therefore, in any event, the determination of this question properly lies within the discretion of this Court.

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[8] See also
United States v. Trans-Missouri Freight Assn., 166 U. S. 290, 17 S. Ct. 540, 41 L. ed. 1007;
Southern Pacific v. Interstate Commerce Commission, 219 U. S. 433, 31 S. Ct. 288, 55 L. Ed. 283;
National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U. S. 261, 58 S. Ct. 571, 82 L. ed. 831;
Federal Trade Commission v. Goodyear Company, 304 U. S. 257, 58 S. Ct. 863, 82 L. Ed. 1326.

B. THE DECISION OF THE STATE COURT ON THIS QUESTION IS NOT SUPPORTED BY ANY DECISIONS OF THIS COURT.

Under the Minnesota Act, income from federal securities is included together with income from all other securities in the measure of the Minnesota corporate franchise tax, practically the sole exception being income from obligations of the State of Minnesota and its governmental subdivisions.

This is not a case in which income from federal securities has been made the principal target of the tax, as was found by this Court in Miller v. Milwaukee, 272 U. S. 713, 47 S. Ct. 280, 71 L. Ed. 487. Nor is this a case where the tax was striking at the immunity from state taxation of federal securities, by making payment or specific exemption from the payment of another tax under the provisions of a statute in no way applicable to federal securities, the basis for exemption from the measure of the new tax. This was the situation in the opinion of this Court in Schuykill Trust Co. v. Pennsylvania, 296 U. S. 113, 56 S. Ct. 31, 80 L. ed. 91. These are the only cases cited by the State Court in its opinion on this question. Nor do any of the other cases cited in respondent's brief deal with a situation in which income from state obligations is the sole exception to inclusion in the measure of a tax. Hence they are not in point.

This question has been fully presented by the State of Minnesota in its Petition and Brief pp. 85-103, of which the following is a summary:

> "(1) The United States Supreme Court decisions relied upon by the Minnesota court do not support its holding that the inclusion of income from federal securities in the measure of the Minnesota corporate franchise tax constitutes "unfriendly discrim-

ination" against United States securities in favor of local securities in 'substantial competition' with federal securities.

(2) The Minnesota statute Section 12, places income from federal securities in the same class as income from all other securities, in regard to inclusion in the measure of its corporate franchise tax, with the sole exception of Minnesota state and local obligations.

(3) Statutes giving preferment to state over federal securities in the matter of this inclusion in measures of franchise taxation have been construed as valid in other states.

(4) New York State now has a statute in force giving certain of its bonds a much greater preferment in the field of corporate franchise taxation, than would be their mere exclusion from the measure of such a tax.

(5) Laws of this character have not interfered with the marketing of federal securities in the important state of New York or elsewhere in the United States.

(6) Congress itself has enacted legislation resulting in giving a preferment to state securities over federal securities by making federal securities subject to surtax and excess profits taxation by the United States.

(7) The granting of some additional inducement to investors in the way of tax preferment is justifiable in the case of state and local securities since they are less attractive to purchasers than federal securities.

(8) The Minnesota corporate franchise tax statute exempts institutional investors which are the most important class of corporate purchasers of both state and Federal securities.

(9) Minnesota has evidenced no hostile intent against the United States government in excluding its own securities from the measure of its corporate franchise tax.

(10) In the cases now before this Court, there is no evidence whatsoever that the securities of the State of Minnesota and its local subdivisions are in 'substantial competition' with the securities of the federal government."

C. THE MINNESOTA SUPREME COURT COULD NOT HAVE EXCLUDED INCOME FROM FEDERAL SECURITIES FROM THE MEASURE OF THE TAX ON RESPONDENTS ON ANY NON-FEDERAL GROUND.

Respondents contend that the State Court would have been compelled to exclude income from federal securities from the measure of respondent's franchise tax in view of its decisions in the within cases.

In answer we quote from the State Court's decision of April 26, 1940 (R. pp. 1817, 1818, 207 Minn. 637, 640, 292 N. W. 410, 413.

> "It cannot be said that the interest so earned was outside exercise of the franchises for railroad purposes nor that the funds so deposited had become so characterized as an investment to produce interest within the holdings in State v. N. P. Ry. Co., 192 Minn. 473, 167 N. W. 294; and State v. Great Northern Railway Company, 139 Minn. 469, 167 N. W. 298."

In the just cited case of State v. G. N. Ry. Co., the Minnesota Supreme Court said (139 Minn. 469, 471, 167 N. W. 297):

> "In addition to such securities the defendant owns others which the Court held not owned or used for railway purposes within the meaning of the gross earnings statute and therefore subject to an ad valorem tax". * * * It owns bonds of the Northern Land Company which owns the quarries at Sandstone from which it gets traffic. It owns stock in an electric company having a power plant in Washington. It is in prospect that the plant will be developed and the power used in the electrification of the defendant's road. It owns the bonds of a hotel company in Spokane; bonds of an irrigation district in Washington; bonds of a land company; bonds of a city in Washington received in payment for property sold; bonds of the Wisconsin Central Railway Company received in exchange for terminal property, and bonds of the Pillsbury-Washburn Company which it took years ago in payment of freight earned, which the company was unable to pay at the time. The court found that the bonds of the Pillsbury-Washburn Company had been held unreasonably long and had ceased to be working capital and had become an investment.
>
> It is clear that property of the general character indicated, though acquired properly and in the exercise of good business judgment, is not owned or used for railway purposes within the principle of our holdings."

Thus many types of securities and holdings were characterized as investments in the Great Northern

Case, which the State Court has cited in its opinion as setting the rule for what is to be characterized as an investment.

Hence it would hardly be possible for the State Court to rule that federal securities are not also **characterized as investments,** within its holdings in the Great Northern case.

Therefore, income from federal securities would have to be included in the measure of respondent's franchise tax as non-railroad income, if it were not for the federal question involved.

CONCLUSION

For the foregoing reasons this Court should grant the petition for writs of certiorari to review the final judgments of the Supreme Court of the State of Minnesota in the above entitled actions and each of them as prayed for therein.

Respectfully submitted,

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